(3)

No. 01-1487

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2001

D.A. Mayle, Warden, Petitioner,
v.
Richard N. Brown, Respondent

Eddie Ylst, Warden, Petitioner,
v.
Ernest Bray, Jr., Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Erwin Chemerinsky
Counsel of Record
University of Southern
California Law School
699 Exposition Blvd.
Los Angeles, CA 90089
(213) 740-2539
FAX (213) 740-5502

Paul Hoffman
Schonbrun, DeSimone,
Seplow, Harris & Hoffman LLP
723 Ocean Front Walk
Venice, CA 90210
(310) 396-0731

Attorneys for Respondents

24 pp

QUESTIONS PRESENTED

1. Whether a sentence of 25 years to life in prison, with no possibility of parole for at least 25 years, is grossly disproportionate in violation of the Eighth Amendment and a violation of clearly established law when it is applied for shoplifting a small amount of merchandise.

2. Whether habeas corpus should be granted because the state court decision was "contrary to" and an "unreasonable application" of clearly established federal law when the state court fails to apply the test set out by the Supreme Court for determining when punishment is grossly disproportionate in violation of the Eighth Amendment.

Table of Contents

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

REASONS THE PETITION SHOULD BE DENIED 4

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY APPLIED CLEARLY ESTABLISHED PRINCIPLES 4

A. The United States Court of Appeals for the Ninth Circuit Correctly Applied Well Established Law to Conclude that an Indeterminate Life Sentence is Cruel and Unusual Punishment When Imposed for Shoplifting a Small Amount of Merchandise 5

B. The Sentence of 25 Years to Life in Prison Imposed on Richard Brown and Ernest Bray Violates Clearly Established Constitutional Principles and Thus Relief Is Appropriate Under a Writ of Habeas Corpus 13

II. IF CERTIORARI IS GRANTED, THIS CASE SHOULD BE HELD IN LIGHT OF THIS COURT'S GRANT OF CERTIORARI IN LOCKYER V. ANDRADE AND EWING V. CALIFORNIA 15

Conclusion 18

TABLE OF AUTHORITIES

	Page
Cases	
Andrade v. Attorney General, 270 F.3d 743 (9th Cir. 2001), cert. granted, 122 S.Ct. 1434 (2002)	1, 3, 15 16, 17
Apprendi v. New Jersey, 120 S.Ct. 2348 (2000)	11
Ewing v. California, unpublished opinion, cert. granted, 122 S.Ct. 1435 (2002)	15
Harmelin v. Michigan, 501 U.S. 957 (1991)	7, 8, 9, 12, 13
People v. Dozier, 93 Cal.Rptr. 600, 605-606 (2000) .	10
Riggs v. California, cert. denied, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari)	11, 12
Rummel v. Estelle, 445 U.S. 263 (1980)	9, 10, 11, 12
Solem v. Helm, 463 U.S. 277 (1983)	7, 9, 10 11, 12, 14
Weems v. United States, 217 U.S. 349 (1910)	7
Williams v. Taylor, 120 S.Ct. 1495 (2000)	13
United States v. Bajakajian, 524 U.S. 321 (1998) . . .	8
Statutes	
28 U.S.C. §2254	3, 13
California Penal Code Ann. §490	4, 10
California Penal Code Ann. §666	5

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Richard N. Brown and Ernest Bray, Jr., hereby oppose the Petition for a Writ of Certiorari by D.A. Mayle and Eddie Ylst to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Respondent adopts and incorporates by reference all opinions and orders below that are set forth in Appendix to Petition for Writ of Certiorari, Appendices A through K.

STATEMENT OF THE CASE

This matter concerns two separate cases which were consolidated by the Ninth Circuit for briefing and oral argument. Both Richard N. Brown and Ernest Bray, Jr., were sentenced, pursuant to California's "Three Strikes" law, to 25 years to life in prison for shoplifting a small amount of merchandise. The Ninth Circuit issued a decision concerning both cases based on its earlier ruling in Andrade v. Attorney General, 270 F.3d 743 (9th Cir. 2001), cert. granted, 122 S.Ct. 1434 (2002). The State of California has filed a

single petition for certiorari regarding both Brown and Bray.

Richard N. Brown was convicted in 1996 for stealing a car alarm from a Walgreen's store. Findings and Recommendations [of the United States Magistrate Judge], Richard N. Brown v. Mayle, at 1 (Appendix C). He was convicted of petty theft with a prior conviction based on earlier offenses. His prior offenses include two burglary convictions in 1971; two felony counts of assault with a deadly weapon in 1976 (one case); one felony robbery and misdemeanor for being under the influence of a controlled substance in 1984; and seven subsequent misdemeanor convictions (which do not count as strikes under California's three strikes law.) Id. at 8-9. As the Magistrate Judge noted, Brown's prior strikes were 13 and 19 years old at the time of his conviction. Id. at 9 n.9.

Ernest Bray, Jr., was caught on March 28, 1994, stealing three video cassettes from the Wherehouse store in Long Beach Mall. Report and Recommendation of United States Magistrate Judge, Bray v. Ylst, at 2-3 (Appendix E). He was convicted of petty theft with a

prior conviction based on earlier offenses. In November 1981, he was sentenced to concurrent sentences for three robberies committed when he was 19 years old. Id. at 11. In 1985, he was convicted of another robbery. His only other conviction before this instance of shoplifting was in September 1991 for a drug offense for which he was sentenced to 90 days in jail. Id. at 12.

Both Brown and Bray appealed to the California Court of Appeal and argued, among other grounds, that the sentences were grossly excessive and violated the Eighth Amendment. The California Court of Appeal rejected this argument in each case. (Appendixes G and L). In each case, review in the California Supreme Court was sought and denied. (Appendixes H and M). Bray and Brown each filed a timely pro se petition for habeas corpus under 28 U.S.C. §2254. In each case, the petition was denied and Bray and Brown filed pro se appeals.

After the Ninth Circuit issued its decision in Andrade v. Attorney General, on November 2, 2001, the United States Court of Appeals for the Ninth Circuit,

on November 14, 2001, appointed counsel to represent Bray and Brown. The Ninth Circuit asked for briefing and oral argument as to the application of Andrade to the habeas corpus petitions of Brown and Bray. On February 7, 2002, the United States Court of Appeals issued its decision holding that based on Andrade, the sentences imposed on Bray and Brown were grossly disproportionate and thus violated the Eighth Amendment. (Appendix A).

REASONS THE PETITION SHOULD BE DENIED

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY APPLIED CLEARLY ESTABLISHED PRINCIPLES

The indeterminate life sentences imposed on Richard N. Brown and Ernest Bray, Jr., for misdemeanor conduct, shoplifting a small amount of merchandise, is a result of laws that are unique to California. California essentially "double counts" the prior offenses. Under California law, the conduct of Brown and Bray generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998). Because of their prior

offenses, Brown's and Bray's misdemeanor conduct, petty theft, were converted by statute into a felony, "petty theft with a prior conviction." California Penal Code Ann. §666. Then, under California's Three Strikes Law, that felony was used to impose a sentence of 25 years to life in prison on each defendant. In other words, the prior offenses were used twice: first to convert a misdemeanor into a felony and then to impose a life sentence based on it being a felony.

The United States Court of Appeals for the Ninth Circuit applied clearly established legal principles to find that the sentences imposed on Brown and Bray constituted cruel and unusual punishment and that relief could be granted on habeas corpus.

A. The United States Court of Appeals for the Ninth Circuit Correctly Applied Well Established Law to Conclude that an Indeterminate Life Sentence is Cruel and Unusual Punishment When Imposed for Shoplifting a Small Amount of Merchandise

The Ninth Circuit's decision was quite narrow. The court was emphatic that "[o]ur decision does not hold the California Three Strikes Law unconstitutional."

App. A., at 30.* The Ninth Circuit simply held that the Eighth Amendment is violated when an indeterminate life sentence is imposed for shoplifting a small amount of merchandise.

The State's petition for certiorari argues that the law is uncertain as to whether grossly disproportionate punishments violate the Eighth Amendment in non-capital cases. Petition for Writ of Certiorari, at 15-19. However, the Ninth Circuit's decision rests on the firmly established principle that grossly

---

*In its petition, the State of California suggests that review is appropriate because the Ninth Circuit's decision will unleash a floodgate of habeas petitions by California prisoners. Petition for a Writ of Certiorari, at 22-23 n. 7. n.1. The State bases this entirely on newspaper stories about the decision.

The State's concern is unfounded. According to recent statistics from the California Department of Corrections, 340 people are incarcerated in California whose third strike was "petty theft with a prior." Department of Corrections, State of California, Data Analysis Unit, Estimates of Statistical Analysis Section, Offender Information Service Bureau, "Second and Third Strikes in the Institution Population By Offense Group and Admission of Return Status," September 10, 2001. Some of these individuals might be procedurally barred from seeking relief because of factors such as the statute of limitations on bringing habeas corpus petitions, the bar on successive petitions, and exhaustion requirements. Thus, although affirming the Ninth Circuit undoubtedly would benefit some other prisoners, this is not likely to be a large number.

disproportionate punishments violate the cruel and unusual punishment clause of the Eighth Amendment. In Weems v. United States, 217 U.S. 349, 371 (1910), this Court held that the Eighth Amendment prohibits "greatly disproportioned" sentences. On many other occasions, this Court has declared sentences unconstitutional as being "grossly disproportionate." In Solem v. Helm, 463 U.S. 277, 288 (1983), the Court observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments."

In Harmelin v. Michigan, 501 U.S. 957 (1991), seven Justices expressly recognized that grossly disproportionate sentences are unconstitutional. In Harmelin, Justice Scalia argued that the Eighth Amendment does not prohibit disproportionate sentences. Id. at 985. However, only Chief Justice Rehnquist joined this part of Justice Scalia's opinion.

Justice Kennedy, concurring in part and concurring in the judgment, expressly disagreed with Justice Scalia, and declared: "The Eighth Amendment does not require strict proportionality between crime and

sentence. Rather, it forbids only extreme sentences that are 'grossly' disproportionate to the crime." Id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in Harmelin, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and contended that "gross disproportionality" was too restrictive a constitutional standard. Id. at 1009, 1012 (White, J., dissenting); id. at 1027 (Marshall, J., dissenting).

No decision since Harmelin has questioned the principle established by almost a century of Eighth Amendment decisions: grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In fact, in United States v. Bajakajian, 524 U.S. 321, 336 (1998), this Court, in invalidating a forfeiture as violating the Eighth Amendment, stated: "[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clauses precedents."

Simply put, if any sentence is "grossly disproportionate," it is an indeterminate life sentence, with no possibility of parole for 25 years, for shoplifting a small amount of merchandise. The Ninth Circuit followed this Court's command that proportionality is to be determined by "objective factors to the maximum extent possible." Rummel v. Estelle, 445 U.S. 263, 274-275 (1980). Specifically, the Ninth Circuit expressly applied the test articulated by this Court in Solem v. Helm, 463 U.S. 277, 292 (1983): "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Under this test, the Ninth Circuit properly found that indeterminate life sentences imposed on Brown and Bray for shoplifting violate the Eighth Amendment. First, the Court compared the gravity of the offense and the harshness of the punishment. The offenses were

minor, petty theft, but the punishment was enormous: a sentence of 25 years to life in prison.

The Ninth Circuit then properly applied the second factor from the Solem test: the sentences imposed on others in the same jurisdiction for similar offenses. Under California law, Brown's and Bray's crimes constituted petty theft, a misdemeanor punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998).

Finally, the Ninth Circuit applied the third Solem factor in evaluating gross disproportionality: the sentences imposed in other jurisdictions. California is the only state in which misdemeanor shoplifting could lead to an indeterminate life sentence with no possibility of parole for 25 years. No other state in the country has such a sentencing scheme where misdemeanor conduct can be the basis for an indeterminate life sentence. See People v. Dozier, 93 Cal.Rptr. 600, 605-606 (2000) (a sentence under the Three Strikes law is, under California law, an "indeterminate life sentence.") As Justice Stevens noted: California is the "only state in the country in

which a misdemeanor could receive such a severe sentence." Riggs v. California, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari).

In Rummel v. Estelle, this Court repeatedly emphasized that it was considering permissible punishment for felony conduct. See 445 U.S. at 274, 278, 284. In fact, the Court stressed the "line dividing felony theft from petty larceny." Id. at 284. Rummel involved felony theft, while these cases concern what California deems to be petty theft.

Justice Stevens recently explained the importance of this distinction: "While this Court has traditionally accorded to state legislatures considerable (but not unlimited deference) to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not fall into that category." Riggs v. California, 525 U.S. at 1114 (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). Indeed, Justice Stevens said that punishing petty theft with a prior conviction by

imposing a life sentence is closely analogous to the punishment declared unconstitutional in Solem: "[P]etty theft has many characteristics in common with the crime for which we invalidated a life sentence in Solem, uttering a 'no account' check for $100. 'It involves neither violence nor (the) threat of violence to any person'; the amount of money involved is relatively small; and the State treats the crime as a felony (here, only under some circumstances) pursuant to a quirk in state law." Id. at 1114 (citations omitted).

In Harmelin v. Michigan, Justice Scalia, joined only by Chief Justice Rehnquist, recognized the possibility of "extreme examples" of very harsh punishments for relatively trivial offenses, but said that "they are certain never to occur." 501 U.S. at 985-986. But that is exactly what occurred in this case: Richard N. Brown and Ernest Bray were sentenced to life imprisonment for shoplifting.

B. The Sentence of 25 Years to Life in Prison Imposed on Richard Brown and Ernest Bray Violates Clearly Established Constitutional Principles and Thus Relief Is Appropriate Under a Writ of Habeas Corpus

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant relief if the state court's decision is "contrary to, or involves an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(i). This Court has stated that the standard for relief is whether the sentence is "contrary to . . . clearly established federal law, as determined by the Supreme Court of the United States" or that it was an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 120 S.Ct. 1495, 1423 (2000).

The Ninth Circuit granted relief because it concluded that the California Court of Appeals' decisions were "contrary to" clearly established law "because the state court decision in both cases failed to apply some or all of the required Supreme Court

analysis." Appendix A, at 9. The Court explained: "Having determined that there was clear error sufficient to satisfy the 'unreasonable application' clause, we hold *a fortiori* the state court decision was 'erroneous' and merits habeas relief under the 'contrary to clause.'" Id. 28.

The California Court of Appeal failed to apply this Court's decision in Solem v. Helm and other cases holding that grossly disproportionate punishments violate the Eighth Amendment. The Ninth Circuit thus properly found that the California Court of Appeal decisions were "contrary to" clearly established law and that an indeterminate life sentence for shoplifting was an unreasonable application of this clearly established law.**

**The state in its petition for certiorari also raises an issue concerning the appropriate methodology for habeas corpus review. Petition for Writ of Certiorari, at 23. However, the state never explains why the choice of methodology would matter at all in this case. The Ninth Circuit found that the sentence imposed on Brown and Bray, 25 years to life in prison, was contrary to clearly established law. This is exactly the test prescribed in the statute and elaborated upon in Williams v. Taylor and Penry v. Johnson, 532 U.S. 782 (2001).

II. IF CERTIORARI IS GRANTED, THIS CASE SHOULD BE HELD IN LIGHT OF THIS COURT'S GRANT OF CERTIORARI IN LOCKYER V. ANDRADE AND EWING V. CALIFORNIA

On April 1, 2002, this Court granted certiorari in two cases concerning the constitutionality of California's Three Strikes law as applied to trivial offenses. Lockyer v. Andrade, 270 F.3d 743 (9th Cir. 2001), cert. granted, 122 S.Ct. 1434 (2002).; Ewing v. California, unpublished opinion, cert. granted, 122 S.Ct. 1435 (2002).

In Andrade, the United States Court of Appeals for the Ninth Circuit ruled that it violated the Eighth Amendment to sentence a person to 50 years to life for shoplifting $153 worth of videotapes. After Andrade was decided by the Ninth Circuit on November 2, 2001, the Court appointed counsel to represent Brown and Bray and asked for briefing and argument as to the application of its decision in Andrade to these cases.

The Ninth Circuit's decision in this case was expressly based on its earlier ruling in Andrade. The Court repeatedly emphasized that it was "applying Andrade here." Appendix A, at 9. In fact, the Ninth Circuit labelled the crucial section of its opinion,

"Application of Andrade to Bray's and Browns' Sentences." Id. at 13. Every part of the Ninth Circuit's opinion focused on whether there is any meaningful distinction between the punishment imposed on Andrade and that imposed on Brown and Bray. Concluding that there was not such a distinction, the Court applied Andrade to find that the sentences imposed on Brown and Bray were grossly disproportionate and violated the Eighth Amendment.'''

'''There are only two possible distinctions between these cases and Andrade. First, Andrade received 50 years in prison, whereas Brown and Bray received sentences of 25 years to life. But under California law, a sentence of 25 years to life, like that imposed on Andrade, is deemed to be an "indeterminate life sentence." Andrade, 270 F.3d at 747-748; People v. Dozier, 93 Cal.Rptr. 600, 605-606 (2000). Under California law, Bray and Brown are not eligible for parole until they have served 25 years of their sentence. In re Cervera, 16 P.3d 176, 177 (Cal. 2000). In fact, Andrade, Brown, and Bray each received a sentence of 25 years to life for each count of petty theft with a prior; the only difference is that Andrade was convicted of two counts and thus sentenced to two consecutive terms of 25 years to life.

Second, each case involved different prior offenses: Andrade's prior offenses included three burglary convictions; Bray's prior offenses included four robberies a decade or more earlier, and Brown's prior offenses included two burglaries and two counts of assault with a deadly weapon 19 and 13 years before the conviction for petty theft with a prior.

The different nature of the priors is immaterial. As the Ninth Circuit ruled, Bray and Brown cannot be

Because the Ninth Circuit's decision was entirely based on Andrade, these cases should be held pending this Court's decision in Andrade. The issue presented in this matter is the same as that presented in Andrade and Ewing: does it violate the Eighth Amendment to impose an indeterminate life sentence for shoplifting a small amount of merchandise?

Moreover, the habeas corpus issues presented in the State's petition for certiorari are the same as those raised in the State's certiorari petition in Andrade. In both Andrade and this case, the State of California

---

punished now for their earlier offenses. Appendix A, at 24-25. That unquestionably would violate the Constitution's prohibition on double jeopardy. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717-718 (1969); Ex parte Lange, 85 U.S. 163, 172 (1873) (double jeopardy is violated if there is subsequent punishment for the same offense). Nor can a defendant be punished for the "status" of being a felon. See, e.g., Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660, 667 (1962) (status cannot constitutionally be made a crime). Therefore, this punishment must be proportionate for this offense, while taking into account the individual's prior criminal record. As the Court declared in Solem v. Helm, 463 U.S. 277, 290 (1983): "[A] criminal sentence must be proportionate to the crime for which the defendant has been convicted." As the Ninth Circuit properly held, the issue is not what the defendants did previously, but rather, whether imposing a life sentence for misdemeanor shoplifting is cruel and unusual punishment.

is asking this Court to decide whether the Ninth Circuit erred in deciding that the California Court of Appeal decision was "contrary to" and an "unreasonable application" of clearly established federal law. In both petitions for certiorari, the State asks this Court to decide whether it is appropriate for a federal court should determine whether a state court decision is erroneous before deciding whether it is contrary to or an unreasonable application of federal law. Because certiorari has been granted on these exact issues in Andrade, review in this case is unnecessary.

Thus, because the Ninth Circuit's decision in this case was expressly based on Andrade and because the issues presented are, to a very large extent, the same as in Andrade and Ewing, this Court should hold this matter pending its decision in Andrade and Ewing.

Conclusion

For the foregoing reasons, respondents Richard Brown and Ernest Bray urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

Erwin Chemerinsky
(Counsel of record)
University of Southern
California Law School
699 Exposition Blvd.
Los Angeles, CA 90089
(213) 740-2539

Paul Hoffman
Schonbrun, DeSimone,
Seplow, Harris & Hoffman
723 Ocean Front Walk
Venice, CA 90210
(310) 396-0731

Certificate of Service

I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 9th day of May 2002, three copies of the Brief in Opposition to Petition for Writ of Certiorari, were mailed, first class postage prepaid, to:

Brian R. Means
Deputy Attorney General
Counsel of Record
Attorney General's Office
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550

Erwin Chemerinsky
Counsel of Record
University of
Southern California
Law School
699 Exposition Blvd.
Los Angeles, CA 90089
(213) 740-2539